No. 13941

United States Court of Appeals

FOR THE NINTH CIRCUIT.

CHARLES WILLIAM AFFELDT, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

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Cases Cited

MISCELLANEOUS

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MAY IT PLEASE THE COURT:

Rather than repeat here the information appearing in reply briefs in the companion cases of *Basil Leroy Sterrett* v. *United States of America,* No. 13901; *John Alan Tomlinson* v. *United States of America,* No. 13892; and *Clair Laverne White* v. *United States of America,* No. 13893, filed in this Court, references will be made to those briefs.

I.

The appellee argues, at page 7 of its brief, that the conscientious objector status is granted only to those who qualify. The record in this case shows that Affeldt qualified for the conscientious objector status. There was no evidence to dispute what he submitted. — *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); *Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. Oct. 23, 1953); *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953); *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953); *United States* v. *Hartman,* — F. 2d — (2d Cir. Jan. 8, 1954); *United States* v. *Benzing,* No. 5862-C, Western District of New York, January 15, 1954; *United States* v. *Lowman,* No. 6093-C, Western District of New York, January 15, 1954.

II.

The appellee argues, at pages 7-8 of its brief, that it is the duty of the boards to classify and the burden rests on the registrant to establish eligibility therefor. This is true as far as it goes. The appellee does not go far enough. The fact of the matter is, if there is no basis in fact for the denial of the exemption, the classification is invalid. See further answers to this argument under Point II of the *Sterrett* reply brief and under Point III of the *White* reply brief filed in this Court.

III.

The statement is made by appellee, on page 9 of its brief, that the Selective Service file indicates basis in fact for the denial of the conscientious objector status. No citation to any part of the file is made. This should be rejected because there is no reference to support it. This also applies to the statement appearing on page 11 of appellee's brief, where it is said that the questions and answers given by a registrant are the basis for denial of the conscientious objector classification.

IV.

The appellee argues, on page 13 of its brief, that because Affeldt informed the board that he would not accept work of national importance this was basis in fact alone for the denial of the conscientious objector status.

It should be noted that nowhere in the record did the appellant state that he was not a conscientious objector. The record shows to the contrary. It is true that he was also seeking, without merit, the exemption given to ministers of religion under the law. But the fact that he relied on his arguments and insisted on the groundless claim for the ministerial exemption as a basis for stating his refusal to do work of national importance did not warrant the denial of the conscientious objector status.

The first and main fallacy of the argument of the appellee is that it ignores the fact that the jurisdiction of the draft boards is limited to classification and issuance of orders for participation in service based on classification. The boards do not have the authority to penalize a registrant or make a determination that flies in the teeth of the facts of record just because the registrant says he will not accept the service or work obliged by the classification. That a registrant declares he will not accept the work or service ordered by the board is no basis in fact to the board or authority for it to say that he is not a conscientious objector. His objections may go farther than the law allows and be conscientious. His penalty is punishment for refusal to do work, not be ordered into the armed forces. That he has objections to the performance of the work does not spell that he is not a genuine conscientious objector. It does not mean that he can be classed as liable for military service. It merely means that, as a genuine conscientious objector, he objects to the work assigned to him. His objection to the work assignment and refusal to do it does not contradict what he said in his papers about being a conscientious objector. It is no basis for the denial of the claim.

Let this argument be emphasized by an analogy. Suppose all black-headed men should do military service and the law said that in lieu of induction into the armed forces all red-headed men should be ordered to do civilian work. Assume that a red-headed man answered in his questionnaire that he was red-headed. Also suppose that the undisputed evidence showed him to be red-headed. His answer would not be proved false or said to be without basis in fact purely because he stated further that he refused to do work of national importance. He still would be red-headed and it would still be the duty of the board to keep him in the red-headed classification. It would not justify taking him out of the red-headed classification and putting him in the classification given to black-headed men simply because he said he would not do the service ordered for red-headed men.

In *United States* v. *Liberato,* 109 F. Supp. 588 (W. D. Pa.), it was held that a registrant could not be ordered inducted into military service because he stated to the board that he wanted the opportunity to decide whether he could accept the work selected by the board. The same principle applies here. The status of appellant as a conscientious objector still remained, notwithstanding his statement that he would not accept work of national importance.

The only legal authority that the board had was to classify appellant properly on the state of the record. If he was not entitled to the minister's exemption then he should have at least been placed in the conscientious objector status regardless of his statement. Appellant could have then been ordered to do civilian work on a proper classification. Had he then refused to comply with the legal classification and was ordered to do civilian work he could still have been prosecuted for failing to do civilian work. It is just as much a violation of the law to refuse to do civilian work as it is to refuse to do military service.

The sum and substance of this answer to appellee's argument is that the courts are the agency chosen by Congress to enforce the penalties for refusing to obey the law. That

a registrant threatens to violate the law does not warrant the board also to violate the law. It is axiomatic that two wrongs do not make a right. The board is not permitted to violate the law because of a threat to defy a civilian work order. When it violates the law for this reason the courts must enforce the law against the board and put it back in its place of making lawful classifications, not unlawful ones because of the threats of the registrant.

The second and last reason why the appellee's argument of basis in fact on the part of appellant in making the claim is not in point is that the directions from the Selective Service System prohibit the draft boards from denying the conscientious objector status on any grounds of waiver unless the waiver is intelligently and deliberately made in writing. As long as the record shows indisputably that a registrant has made the claim lawfully and has not withdrawn the claim in writing it is beyond the authority of the boards to forfeit the claim for any reason except a denial based on facts showing the registrant not to be a conscientious objector. The only way the board can avoid properly classifying according to the undisputed evidence showing conscientious objections is to get a written waiver from the registrant. See Local Board Memorandum No. 41, issued by National Headquarters of Selective Service System, November 30, 1951, as amended, August 15, 1952. A copy of this memorandum accompanies this reply brief. See also *United States* v. *Knight,* No. 20283, Northern District of Ohio, April 25, 1951; *United States* v. *Stephens,* No. 20284, Northern District of Ohio, April 25, 1951; *United States* v. *Carleton,* No. 6030, Southern District of Ohio, October 24, 1951.

It is respectfully submitted that the argument made by appellee about the conscientious objector claim being waived because appellant stated he would not accept work of national importance should be rejected by the Court.

V.

It is stated by appellee, on page 15 of its brief, that

the claim for the ministerial exemption was considered. The ministerial classification is not involved in this case. The contention at the top of page 15 of appellee's brief is a moot question.

VI.

The argument is made on pages 15-16 of appellee's brief, that the fact that Affeldt is not entitled to be classified as a minister and is not engaged in the ministry as his vocation but is working in a full-time secular activity, is basis in fact for the denial of the classification. Performance of secular work and lack of ministerial status under the law are not relevant to the question of whether the registrant is entitled to the conscientious objector status.—See reply brief in companion case of *Sterrett* v. *United States,* under Part IV.

VII.

The argument is made by the appellee, at pages 17-18 of its brief, that the request of Affeldt for the FBI report was too late. It is said that because he requested the unfavorable evidence at the time of the hearing and not before the date set for the hearing he has waived the right to complain about the error of the trial court in refusing to allow the FBI report to be received into evidence.

The hearing officer did not raise this objection. When the request was made by Affeldt for the unfavorable evidence he attempted to comply with it. Since there was no claim made by the hearing officer that the demand was untimely it is entirely out of order and immaterial to urge here that it was too late. The hearing officer in this case testified in the companion case of *Tomlinson* v. *United States of America,* No. 13892, that it was his practice invariably to give the registrant notification of the unfavorable evidence appearing in the file even when it was not requested.—See reply brief in the *Tomlinson* case, Part VIII.

The requirement that the request be made before the date set for the hearing is a requirement that can be waived by the hearing officer. Since the hearing officer did not insist on the timely request but undertook to comply with it, notwithstanding its being late, the appellee is in no position to argue that the request was not timely and for that reason the failure to allow the FBI report to be used as evidence is harmless error.

The secret investigative report should have been received into evidence at the trial.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953); *United States* v. *Stull,* Cr. No. 5634, Eastern District of Virginia, November 6, 1953; *United States* v. *Brussell,* No. 3650, District of Montana, November 30, 1953; *United States* v. *Parker* and *United States* v. *Broadhead,* Nos. 3651, 3654, District of Montana, December 2, 1953; *United States* v. *Staseric,* No. C. 142-143, Southern District of New York, December 17, 1953.

VIII.

The appellee argues that the failure to receive the FBI report into evidence is harmless error. This argument is contrary to *Kotteakis* v. *United States,* 328 U. S. 750. It is answered further in the reply brief for Tomlinson, under Part X.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

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